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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/797,850

03/10/2004

Fredrick O. Cope

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EXAMINER

SIMMONS, CHRIS E.

ART UNIT

PAPER NUMBER

1614

MAIL DATE

DELIVERY MODE

09/10/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/797,850

Applicant(s)

COPE, FREDRICK

Examiner

Chris E. Simmons

Art Unit

1614

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 24 August 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 15-36 is/are pending in the application.
- 4a) Of the above claim(s) 15-17 and 19-36 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 18 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 11/10/2005 and 11/17/2004.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Election/Restrictions***

Applicant's traverse of Examiner's decision that claim 17 is not generic to Group I is found persuasive. It is now the Office's position that claim 17 is generic to Group I.

Applicant's election without traverse of Group I (claims 15-30) in the reply filed on 08/24/2007 is acknowledged.

Claims 31-36 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 08/24/2007.

Claims 15-17 and 19-29 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected specie, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 08/24/2007.

Claim 18 is presented for examination on the merits.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

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1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claim 18 is rejected under 35 USC 103(a) as being unpatentable over US 6,630,163 ('163) in view of US 6,121,243 ('243) in further view of US 2002/0045667 ('667).

***Determination of the scope and content of the prior art (MPEP 2141.01)***

'163 discloses in EXAMPLE 11 a dermatologic composition comprising methylparaben, propylparaben, amylopectin, and the plant oil, thyme oil. The topical pharmaceutical compositions in this reference may also comprise a sunscreen such as benzoic acid (column 6, lines 34-37 and 52-56). Any pharmaceutically acceptable carrier may be used with dermatological agents, as will readily be apparent to one of ordinary skill in the art (e.g., pectin, xanthan gum – column 8, lines 30-32 and lines 58-59). Vitamin E (d-alpha tocopherol salt) is taught as an anti-inflammatory or antioxidant that may be added to the compositions of this invention (column 13, lines 27-36 and column 14, lines 26-27). It teaches that the antifungal agent benzalkonium is a component that is useful for compositions of this invention.

***Ascertainment of the difference between the prior art and the claims (MPEP 2141.02)***

'163 does not disclose expressly tributyl phosphate, citricidal, or petrolatum jelly in the composition. '163 does not disclose expressly the claimed ranges.

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***Finding of prima facie obviousness***

'243 discloses a skin care composition comprising hydrocarbons such as petrolatum and extracts such as citricide.

'667 discloses a composition for topical use comprising tributyl phosphate and benzalkonium.

The reference are analogous art because they are from the same field of endeavor viz pharmaceutical compositions for topical use.

At the time of the invention it would have been obvious to a person of ordinary skill in the art to make the composition as claimed.

In the case where the claimed ranges overlap or lie inside ranges disclosed by the prior art a prima facie case of obviousness exists. (See MPEP 2144.05 [R-5] I). It is not patentable to optimize concentrations of compositions' ingredients through routine experimentation. Differences in concentration will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration is critical. It is not inventive to discover the optimum or workable ranges by routine experimentation. (See MPEP 2144.05 [R-5] II A).

***Rational and Motivation (MPEP 2142-2143)***

The suggestion/motivation for doing so would have been to add functional equivalents like the antimicrobials citricide and bezalkonium to a composition to provide an additive antimicrobial effect to the antimicrobial and preservative properties of methylparaben with the reasonable expectation of having an additive effect.

Therefore it would have been obvious to combine the references to obtain the claimed invention as specified in claim.

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A reference is good not only for what it teaches by direct anticipation but also for what one of ordinary skill in the art might reasonably infer from the teachings. (*In re Opprecht* 12 USPQ 2d 1235, 1236 (Fed Cir. 1989); *In re Bode* 193 USPQ 12 (CCPA) 1976). In light of the forgoing discussion, the Examiner concludes that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a). From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

**No claims are allowed.**

### **Correspondence**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Chris E. Simmons whose telephone number is (571) 272-9065. The examiner can normally be reached on Monday - Friday from 7:30 - 5:00 PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ardin Marschel can be reached on (571) 272-0718. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Chris Simmons  
Patent Examiner  
AU 1614

August 30, 2007

  
ARDIN H. MARSCHEL  
SUPERVISORY PATENT EXAMINER